Supreme Court, U.S.
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No. 99-1019

IN THE

Supreme Court of the United States

WORTHINGTON CORPORATION,

Petitioner,

v.

ELAINE RONSINI, EXECUTRIX OF THE ESTATE OF FRANK RONSINI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether this Court should deny the petition in light of the fact that (1) the ruling in this action is not in conflict with any decision of this Court or any appellate court, (2) every appellate court has consistently required some government involvement in the contractor's warning or failure to warn as a requisite to applying the government contractor defense, and (3) petitioner could not have prevailed in any court on the basis of this defense?

2. Whether this Court should deny the petition because it seeks, in effect, a review of the factual conclusions of the jury, the trial court and the Appellate Division, which correctly rejected the government contractor claim because there was no proof of any conflict between the State law duty to warn and petitioner's contract with the Navy, which was entirely silent on the issue of warnings?

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COUNTERSTATEMENT OF THE CASE

A. Nature of Case and Procedural History

This is a product liability action arising from the asbestos-related injuries suffered by plaintiff's decedent, Frank Ronsini, as a result of his occupational exposure to the asbestos-containing equipment manufactured and supplied by petitioner Worthington Corporation ["Worthington"]. Mr. Ronsini was a hard-working 44-year-old family man and father of three daughters when he began suffering from the excruciating symptoms of malignant mesothelioma in November 1994.

Early in the trial of this action, with Mr. Ronsini on his deathbed, plaintiffs withdrew their design defect claim to avoid undue delay and excessive conflict with defense counsel, and proceeded solely on the basis of Worthington's failure to warn [Pet.'s App. at 41a]. The jury reached its verdict in favor of the plaintiffs in December 1996, finding that Mr. Ronsini had been exposed to asbestos-containing products manufactured by Worthington, that these products were defective because they lacked a warning, and that Worthington's failure to warn of the health risks associated with the use of its products was a proximate cause of Mr. Ronsini's injuries [Pet.'s App. at 15a-16a]. Addressing Worthington's post-trial motions, the trial court, in its Decision and Order dated May 20, 1997, stressed that:

> Worthington's primary argument is that plaintiff failed to prove that any asbestos supplied by Worthington was inhaled by Mr. Ronsini. . . . The primary issue was left to the trier of fact. The jury unanimously found for the plaintiff and had

> sufficient competent evidence before it that plaintiff Frank Ronsini was occupationally exposed to defendant Worthington's products; that its asbestos-containing products were defective and they were a proximate cause of Mr. Ronsini's injuries.

[Pet.'s App. at 7a]. The court summarily rejected Worthington's numerous other post-trial omnibus issues, including a government contractor claim [Pet.'s App. at 7a].

In its appeal to the Appellate Division, Worthington again relegated the government contractor issue to the back burner, raising it merely as an afterthought toward the end of its sprawling brief. When Worthington finally discussed the issue, it fully accepted the principle, adopted throughout the circuits with only minor variation in its articulation, that the government contractor defense can apply to failure-to-warn claims, but only if the manufacturer proves " 'the applicable federal contract includes warning requirements that significantly conflict with those that might be imposed by state law' " [Worthington's Appellate Division Brief (hereinafter "Worth.'s Brief") at 35].

Because Worthington made absolutely no factual showing of any conflict between the contract and state law duty-to-warn principles, and did not even try to do so, the Appellate Division rejected Worthington's government contractor claim, correctly holding that, "[i]n the absence of any evidence of a conflict between State warning requirements and any Federal prescription of label information or proscription of a warning, there was no basis for Worthington's requested government contractor defense charge" [Pet.'s App. at 3a]. The Appellate Division also

rejected Worthington's principal claims on appeal concerning product exposure [Pet.'s App. at 2a-3a].

Worthington's subsequent motion for reargument and motion seeking leave to appeal to the New York Court of Appeals followed much the same pattern. In each instance Worthington raised a government contractor claim as the last of several issues. On September 16, 1999, the Court of Appeals entered its Decision denying the motion and awarding costs against Worthington [Pet.'s App. at 30a-31a].

B. Statement of Facts

At all stages of the appellate process, Worthington has conceded that (1) Mr. Ronsini's injuries, and ultimately his death, were proximately caused by his heavy exposure to hazardous asbestos while servicing Worthington's equipment in the Navy, (2) Worthington manufactured and supplied the asbestos-containing "pumps, compressors and turbines that were on-board the U.S.S. Weeks and the U.S.S. Gearing" [Worth.'s Brief at 9-10], (3) Worthington "supplied . . . asbestos-containing component parts" [Worth.'s Brief at 17], and (4) Worthington never issued any warnings [Worth.'s Brief at 22]. Worthington's claim throughout was chiefly a technical claim that it should not be found liable because most of the asbestos-containing parts within its equipment had been replaced by identical replacement parts over the years. The Appellate Division easily dispensed with that issue against Worthington [Pet.'s App. at 2a].

With regard to Worthington's blameworthiness, the proofs, in accord with New York's well settled product liability principles,[1] established, and the jury found, that

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1. *Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289, 297, 582 N.Y.S.2d 373, 376 (1992) ("[a] manufacturer has a duty to

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Worthington had actual and constructive knowledge of the extreme hazards of the asbestos placed in or over its equipment, and yet failed to issue any warnings about those hazards. For example, the proofs established that in 1944 Worthington advertised at length in the very issue of the manufacturers' trade periodical "Heating and Ventilating Magazine" in which University of California Professor F.W. Hutchinson published an article entitled "Dust as an Industrial Health Hazard" [TT 3081].[2] Thus, alongside Worthington's boasts about its "large power and industrial equipment lines" [TT 3084], Hutchinson informed the entire industry, including Worthington, about the incurable nature of asbestos diseases, and the ways in which exposure to asbestos was "a hazard to people in the insulating trade" [TT 709]. Moreover, Dr. Barry Castleman, an eminent scientist, testified about the abundant medical and scientific knowledge regarding the hazards of asbestos that had been published and was available to manufacturers such as Worthington as early as the 1920's and 1930's [TT 671-99].

(Cont'd)
warn against latent dangers resulting from foreseeable uses of its products of which it knew or should have known"); *Martin v. Hacker*, 83 N.Y.2d 1, 8, 607 N.Y.S.2d 598, 601 (1993) ("[t]he manufacturer's duty is to warn of all potential dangers in its [products] that it knew, or, in the exercise of reasonable care, should have known to exist"); *Cover v. Cohen*, 61 N.Y.2d 261, 275-76, 473 N.Y.S.2d 378, 385 (1984) (manufacturer liable for failing to warn of dangers that come to his attention either directly or through advancements in the state of the art, "with which he is expected to stay abreast").

2. Numbers in brackets following "TT" refer to transcript pages in Volumes II-V and the "Exhibit Volume" of the "Joint Appendix of Appellants" submitted to the Appellate Division, First Department; numbers in parentheses following "JA" refer to pages in the "Joint Appendix of Plaintiffs-Respondents" submitted to the Appellate Division, First Department.

Significantly, Worthington, as the "world's largest builder of pumping machinery" in the 1940's [TT 1215], made all of its machinery the same way, regardless of whether it was sold to the Government. Indeed, Francis Arsi, Worthington's Manager of Government Sales and its designated corporate witness, conceded that it was Worthington's policy, regardless of Navy specifications, to design and load its equipment with asbestos-containing parts. He stated that Worthington "common[ly]" marketed "asbestos-containing gaskets and packing" to customers other than the Government [TT 1863].[3]

Nonetheless, evidently to protect its powerful market position, Worthington *never* issued any type of warning to users such as Mr. Ronsini, or to any other users, whether in the private or government sector [TT 1210, 1855-56]. Nor, in violation of its duty under New York law,[4] did Worthington at any time test or inspect the job site regarding the presence or hazards of asbestos [TT 1212, 1217], despite

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3. *See Megill v. Worthington Pump, Inc.*, 1999 U.S. Dist. LEXIS 4433, LEXIS op. at 9 n.1 (D. Del. Mar. 26, 1999) ("[t]he record contains no evidence that the pumps sold by Worthington to the U.S. Navy were different from those pumps sold commercially"); *cf. In re Hawaii Fed. Asbestos Cases — Kaiu v. Raymark Indus., Inc.*, 960 F.2d 806, 812 (9th Cir. 1992) ("the military constituted a relatively insignificant purchaser of [asbestos-containing insulation] products that were primarily designed for applications by private industry").

4. *See Cover v. Cohen*, 61 N.Y.2d 261, 275-76, 473 N.Y.S.2d 378, 385 (1984) (manufacturer has duty to "stay abreast" of any health and safety research relevant to its product); *George v. Celotex Corp.*, 914 F.2d 26 (2d Cir. 1990) (under New York law, a manufacturer "has a duty 'to keep abreast of scientific knowledge, discoveries, and advances and is presumed to know what is imparted thereby' ").

the fact that, as Mr. Arsi admitted, neither "the government [n]or any entity" prohibited Worthington from conducting such an inspection [TT 1216-17]. There was similarly no evidence whatsoever that the Navy controlled or would have prevented plaintiff from wearing some protective respiratory device had he been warned of the hazards of exposure to asbestos-containing dusts.

Further, Worthington instructed purchasers of its pumps and compressors to replace the asbestos-containing components with like parts. Another corporate defense witness, Dennis Norton, Vice-President of Worthington's Government Business Unit, conceded that Worthington supplied spare parts, and that these matched the original asbestos-containing equipment, although "[t]here was no spec for it, no mil spec for the material. [There was no] military specification" [Pet.'s App. at 60a; TT 1943]. This is a significant admission with respect to the issue of whether Worthington even has a colorable claim to government contractor immunity, especially in light of the Appellate Division's finding that Worthington supplied "enough replacement parts for there to be Worthington components still in use at the time of Mr. Ronsini's exposure, and it was reasonable to infer that such parts had in fact been supplied and used" [Pet.'s App. at 2a].

In all events, Worthington created and provided the original instruction and service manuals for the compressors that Mr. Ronsini serviced on board the U.S.S. Weeks and the U.S.S. Gearing [Pet.'s App. at 61a-62a; JA 417; TT 1944-45, 1950]. Notably, those manuals contained no warnings and apparently involved no direct input from, or back and forth with, the Government [JA 417-82].

Instead, it was not until 1972, when Mr. Ronsini left the Navy, that the Government produced an "updated" manual that paralleled and essentially adopted Worthington's original manual [JA 235]. Indeed, Mr. Norton conceded that Worthington "ma[d]e up a lot of material" in this updated manual [TT 1949]. Critically, this later "Navy" manual provides no specification, guideline, or contract requirement with respect to the issuance of warnings. In short, no government specification, guideline, pronouncement, practice or contract term in any way impaired or conflicted with Worthington's state law duty to warn.[5]

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5. Finally, Worthington's petition is characterized by numerous significant misstatements of fact and law, which respondent is here compelled to address, pursuant to Supreme Court Rule 15(2). For instance, in upholding the jury's verdict against Worthington the trial court implicitly and explicitly found that Worthington knew or should have known of the hazards of its products, but tortiously failed to warn. Yet in the instant petition — as it unsuccessfully attempted to do in the State appellate courts — Worthington tries to recast an unrelated trial court ruling (concerning New York's discrete judgment molding principles) as a blanket finding that it "had no knowledge of a risk about which it could have warned workers" [Pet. at 5]. Quite the contrary, as shown in the text above, the trial court made clear its view that, as the Appellate Division recognized, the proofs compellingly supported the verdict.

Nor does the record in any way substantiate Worthington's related claim in its petition that, "[i]ndeed, the Navy had far greater and more sophisticated knowledge of the potential hazards and dangers of asbestos-containing products than did Worthington" [Pet. at 5]. This claim is false, and nothing in the appendix pages to which Worthington cites supports the assertion. The simple fact is that there is no evidence that the Navy had "far greater and more sophisticated knowledge" than Worthington did; nor is there any evidence that Worthington ever attempted to find out what the Navy knew about the dangers of asbestos use, or that it attempted in any way to warn the Navy about those dangers.

REASONS FOR DENYING WRIT

THE RULING IN THIS ACTION IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR ANY APPELLATE COURT, NOR IS THERE ANY CONFLICT AMONG THE APPELLATE COURTS, ALL OF WHICH REQUIRE GOVERNMENT INVOLVEMENT IN THE DECISION WHETHER TO WARN

A review of the decisions of each appellate court that has considered the issue makes clear that there is no conflict regarding the circumstances under which the government contractor defense may apply to a failure-to-warn claim. The state of the law in each circuit is that "[i]n the government contractor defense context, design defect and failure to warn claims differ practically as well as theoretically." *Tate v. Boeing Helicopters*, 55 F.3d 1150, 1156 (6th Cir. 1995). As the Seventh Circuit has noted, there is little difference between the circuit rulings on this issue. *Oliver v. Oshkosh Truck Corp.*, 96 F.2d 992, 1004 n.8 (7th Cir. 1996), *cert. denied*, 520 U.S. 1116, 117 S. Ct. 1246 (1997).

Initially, Worthington concedes that it could not prevail in the Second, Ninth or Eleventh Circuits, because these "apply the same" interpretation of the applicability of the government contractor defense to a failure-to-warn claim as did the Appellate Division [Pet. at 15]. Worthington also acknowledges that the Sixth and Seventh Circuits view the defense to require completely different factual predicates, depending on whether the defense is applied to a design defect or a failure-to-warn cause of action. Thus, Worthington's only claim of any conceivable conflict arises from its misinterpretation of rulings in the Fourth and Fifth Circuits. However, as will be shown below, even a cursory

reading of decisions in those circuits establishes that they, too, have uniformly construed the defense to require proof of some government involvement in the contractor's decision whether to warn.

It is clear that, in the present case, the Appellate Division's rejection of petitioner's attempt to invoke the government contractor defense follows this Court's decision in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S. Ct. 2510 (1988), and presents no conflict with any other appellate court's pronouncements. Because there is no conflict, petitioner has felt compelled to scrutinize the cases in a search for any nuances or imagined nuances, has taken these imagined nuances out of context, and now tries to argue that this Court should find that "the nation's appellate courts are divided" [Pet. at 15]. They are not, and, in fact, there are no conflicts.

The Appellate Division correctly ruled that, "[i]n the absence of any evidence of a conflict between State warning requirements and any Federal prescription of label information or proscription of a warning, there was no basis for Worthington's requested government contractor defense charge" [Pet.'s App. at 3a]. The Appellate Division's ruling is in total harmony with the universally-held view that, while the government contractor defense may sometimes apply to failure-to-warn claims, it does so only under the limited circumstances in which the party seeking to assert the defense can prove that the Government was in some way involved in the contractor's decision about warnings. That ruling is also in accord with the state of the law in each circuit that has examined the issue, and not one circuit would apply the government contractor defense under the circumstances of the present case.

Courts have applied *Boyle* consistently. In each case, the question is always whether the Government expressly "considered" and was involved with the particular feature of the product — *i.e.* the particular design feature or the warning or lack of warning — alleged to be injurious. 487 U.S. at 512, 108 S. Ct. at 2518. Moreover, in the warnings context, the courts consistently state the issue to be whether the contractor could have complied "with both its contractual obligations and the state-prescribed duty of care" with regard to warnings, and whether a "conflict exists between the state tort duty and the federal contractual duty." *Dorse v. Eagle-Picher Indus., Inc.*, 898 F.2d 1487, 1489 (11th Cir. 1990); *In re Joint Eastern and Southern Dist. New York Asbestos Litig. — Grispo v. Eagle-Picher Indus., Inc.*, 897 F.2d 626, 630 (2d Cir. 1990) [hereinafter *New York Asbestos Litig.*] (stressing that the issue is whether any Navy specification "conflict[ed] with a state law duty to warn," and that a "federal contract specification requiring a certain product design" does not automatically "conflict[ ] with state law requiring a certain set of warnings incident to use of that product or design").

With respect to rulings in the state courts, Worthington concedes [Pet. at 19-20], as it must, that these, too, have universally adopted the principles just stated, and that none of these courts agrees with Worthington's position that, for purposes of government contractor immunity, the failure-to-warn claim simply dissolves into the design defect cause of action. *E.g.*, *Miller v. United Technologies Corp.*, 660 A.D.2d 810, 836 (Conn. 1995); *Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc.*, 884 P.2d 920, 930-31 (Wash. 1994); *see also Feldman v. Kohler Co.*, 918 S.W.2d 615, 627 (Tex. Ct. App. 1996); *Jackson v. Deft, Inc.*, 273 Cal. Rptr. 214, 221 (Ct. App. 1990); *In re New York City Asbestos*

Litigation — Weitzman v. Eagle-Picher Industries, Inc., 144 Misc. 2d 42, 542 N.Y.S.2d 118, 120 (Sup. Ct., N.Y. Cty. 1989) (stressing that asbestos defendants under contract with the Government "could have complied with both the military specifications and also placed adequate warnings on [their] packages, without in any way frustrating any identifiable federal interest").

As the Appellate Division correctly noted, and as implicitly conceded by petitioner, Worthington has not been able to proffer even a scintilla of evidence that the Navy ever considered or exercised any discretion about the issuance of warnings with regard to Worthington's pumps, turbines and/or compressors. Certainly, Worthington produced no evidence whatsoever that the Navy would have objected to a warning that workers should take some protective measure when exposed to ultrahazardous asbestos dust and fibers. Nor was there any evidence that the Navy ever took any position at all on the question of whether to warn the workers. Worthington's failure to warn was entirely its own decision, and was fully consistent with Worthington's failure to warn any of its many customers or product users worldwide about the asbestos health hazards. The Navy was simply silent on this issue, uninvolved in any way.

Worthington has failed to demonstrate that any appellate court has upheld application of the government contractor defense under circumstances similar to those present here, or in the context of any failure-to-warn asbestos-related action for that matter.[6] Instead, anxious to prevent the finality

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6. Indeed, those courts dealing with the government contractor defense in asbestos actions have consistently rejected the defense as applied to the failure to warn cause of action. *See, e.g., New York*

(Cont'd)

of this action, having exhausted all state appellate remedies, Worthington seeks to create a conflict in the circuits where there is none. Well aware that there is no proof that the Navy ever took any position regarding the issuance of warnings on the part of Worthington or any other provider to the Government of asbestos-containing products, Worthington desperately misconstrues the law in two circuits, the Fourth and the Fifth. In so doing, Worthington wrongly suggests that no government involvement is required at all for a manufacturer to obtain government contractor immunity from liability for failing to warn users and consumers of the hazardous asbestos components contained in their products [Pet. at 15-16].

However, Worthington's interpretation of the state of the law in the Fourth and Fifth Circuits is entirely incorrect. Worthington wrongly holds out the cases of *Emory v. McDonnell Douglas Corp.*, 148 F.3d 347 (4th Cir. 1998), in the Fourth Circuit, and *Smith v. Xerox Corp.*, 866 F.2d 135 (5th Cir. 1989), in the Fifth Circuit, as standing for the proposition that, in those courts, the government contractor defense somehow automatically precludes a failure to warn claim when it precludes a design defect claim.

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Asbestos Litig., 897 F.2d 626, 630 (2d Cir. 1990); *Dorse v. Eagle-Picher Indus., Inc.*, 898 F.2d 1487, 1489 (11th Cir. 1990); *In re Hawaii Fed. Asbestos Cases — Kaiu v. Raymark Indus., Inc.*, 960 F.2d 806, 812 (9th Cir. 1992); *In re New York City Asbestos Litigation — Weitzman v. Eagle-Picher Industries, Inc.*, 144 Misc. 2d 42, 542 N.Y.S.2d 118, 120 (Sup. Ct., N.Y. Cty. 1989); *see also Feidt v. Owens Corning Fiberglas Corp.*, 153 F.3d 124, 127 (3d Cir. 1998); *Megill v. Worthington Pump, Inc.*, 1999 U.S. Dist. LEXIS 4433, LEXIS op. at 9 n.1 (D. Del. Mar. 26, 1999); *Hammond v. North American Asbestos Corp.*, 97 Ill.2d 195, 454 N.E.2d 210 (Ill. Sup. Ct. 1983).

In *Emory*, however, the Court of Appeals established that, in the Fourth Circuit, the failure-to-warn claim is considered separately from the design defect claim, and is evaluated on the basis of discrete factors. While the *Emory* Court ultimately affirmed the dismissal of the plaintiff's failure-to-warn claim, this ruling had nothing at all to do with the government contractor defense. Instead, the Court decided the appeal solely on the basis of Maryland products liability law. Significantly, the Court noted that, although the government contractor had presented a factual predicate sufficient to preclude the application of Maryland law with respect to Emory's design defect claim, that State's law regarding failure to warn *should be applied*, because it in fact "poses no conflict." 148 F.3d at 352-53.

Thus, *Emory* demonstrates that, in the Fourth Circuit, as in each circuit addressing the issue, the failure-to-warn claim must be separately scrutinized for a "significant conflict" as between state law requirements and Federal interests. Consistently, under *Boyle*, Federal interests are implicated only when the "feature in question" — in a failure-to-warn context the warning or lack of warnings — "was considered by a Government officer, and not merely by the contractor itself." *Boyle*, 487 U.S. 500, 512, 108 S. Ct. 2510, 2518.

With respect to the Fifth Circuit, the appropriate case to examine is *In re Air Disaster At Ramstein Air Base, Germany — Perez v. Lockheed Corp.*, 81 F.3d 570 (5th Cir. 1996) [hereinafter *Ramstein*], a case Worthington merely alludes to in a cryptic footnote [Pet. at 16 n.4]. In *Ramstein* the Fifth Circuit held that the defendants had satisfied each of the three *Boyle* elements with regard to the design defect cause of action, and then discretely addressed plaintiffs' failure-to-warn claim. The Court enunciated the Fifth Circuit's view,

which is fully in accord with *Boyle*, with the Appellate Division's ruling in the present case, and with the other circuits that have addressed the issue. Specifically, the Court held that

> [a] separate failure to warn claim may survive the government contractor immunity defense if the defendant cannot establish "an identifiable federal interest or policy in the existence or methods of warning and a significant conflict between the federal interest or policy and the operation of state law." *Garner v. Santoro*, 865 F.2d 629, 635-36 (5th Cir. 1989). A conflict between federal policy and state law might arise if there is evidence that the Government was involved in the decision to give, or not to give, a warning.

81 F.3d 570, 576.

Notwithstanding its dismissal of plaintiffs' design defect claims on the basis of the government contractor defense, the Fifth Circuit panel in *Ramstein* found that the evidence adduced by defendants did not permit it "to determine whether the Government exercised sufficient discretion with respect to a warning to bring the warning claim within the scope of *Boyle*." *Id.* Accordingly, the Court concluded that the only issue was whether the defendants had a duty to warn "under the relevant state law . . . ." *Id.*[7]

Relegating the leading and most current Fifth Circuit opinion in *Ramstein* to a footnote, Worthington relies

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7. The *Ramstein* Court, applying the law of Georgia, found that, under that State's product liability precepts, there was no duty to warn.

exclusively on an earlier and irrelevant case, *Smith v. Xerox Corp.*, to illustrate the state of the law in the Fifth Circuit. Worthington's approach is disingenuous, both because *Smith* never expressly addresses the issue of the applicability of the government contractor defense to failure-to-warn claims, and because *Ramstein* does.

The ruling in *Smith* in no way establishes, as Worthington suggests, some anomalous Fifth Circuit principle by which a plaintiff's failure-to-warn claim is subsumed within his design defect claim for purposes of the government contractor defense. Apart from originally including a failure-to-warn claim in his complaint, Smith does not appear to have independently raised this issue in his appeal; nor did Xerox address Smith's failure-to-warn claim in its pre-*Boyle* summary judgment motion. Accordingly, the appeal in *Smith* was confined to the design defect cause of action only, and did not deal with the failure-to-warn issue at all. In sum, *Smith* is simply not informative about the way in which the Fifth Circuit applies the government contractor defense to failure-to-warn claims.[8]

Thus, notwithstanding Worthington's misreading, the state of the law in the Fourth and Fifth Circuits is that, when government contractor immunity is asserted, the failure-to-warn claim must be considered separately from the design

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8. On the other hand, it is noteworthy that the *Smith* Court of Appeals indicated that the Fifth Circuit is fully in accord with the Ninth Circuit's view of the government contractor defense. 866 F.2d 135, 137 (citing *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444 (9th Cir. 1983)). In the instant petition, Worthington admits that the Ninth Circuit requires government involvement in the decision whether to warn, and also concedes that it could not prevail in that Court. But Worthington overlooks the fact that the Fifth Circuit had aligned itself with the Ninth.

defect claim, and stands or falls on its own. *See Emory*, 148 F.3d 347, 350. In these appellate courts, unless "the Government exercised sufficient discretion with respect to a warning to bring the warning claim within the scope of *Boyle*," and unless the defendant has demonstrated, at the very least, that "the Government was involved in the decision to give, or not to give, a warning," the government contractor defense will not be deemed to apply to plaintiff's failure-to-warn claims. *Ramstein*, 81 F.3d 570, 576. Indeed, this approach is entirely reasonable, and in accord with the other rulings applying *Boyle* in the failure-to-warn context.

Accordingly, there is no conflict between the Appellate Division ruling in the present case, and the state of the law in the Fourth and Fifth Circuits. Nor do rulings in the Fourth and Fifth Circuit, or the Appellate Division ruling for that matter, in any way conflict with this Court's pronouncement in *Boyle*, or with the decisions in other circuits. Thus, Worthington — which adduced absolutely no evidence of any Government interest or involvement in the issue of warnings — would not prevail in any circuit, including the Fourth or Fifth Circuits, which Worthington claims are the most favorable to its position.

Indeed, all of the appellate court rulings cited by Worthington are in accord. As the Seventh Circuit stressed in *Oliver*, it is "well established . . . that a defendant may not defeat a state failure-to-warn claim simply by establishing the elements of the government contractor defense with respect to a plaintiff's design defect claim." 96 F.3d at 1003.[9]

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9. In *Oliver* this Court denied certiorari with respect to the very issue Worthington now raises. 520 U.S. 1116, 117 S. Ct. 1246 (1997).

The case of *Tate v. Boeing Helicopters*, 55 F.3d 1150 (6th Cir. 1995), is also illustrative. In *Tate* the Sixth Circuit affirmed the dismissal of plaintiffs' design defect claim, but held that a separate analysis must be performed with respect to plaintiffs' failure-to-warn claims. As to design defect, the Court noted the consensus among the circuits that, under the first *Boyle* prong, defendant must show that the government and the contractor "engage[d] in a 'continuous back and forth' review process regarding the design in question." *Id.* at 1154 (quoting *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311, 1320 (11th Cir. 1989); *Koutsoubos v. Boeing Vertol*, 755 F.2d 352, 355 (3d Cir.), *cert. denied*, 474 U.S. 821, 106 S. Ct. 72 (1985)). The Court also recognized that the general rationale for this requirement is that, " '[w]hen the government merely accepts, without any substantive review or evaluation, decisions made by a government contractor, then the contractor, not the government, is exercising discretion.' " *Tate*, 55 F.3d 1150, 1154 (quoting *Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1480 (5th Cir.), *cert. denied*, 493 U.S. 935, 110 S. Ct. 327 (1989)).[10]

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10. In the present case, of course, there is no evidence of "a continuous back and forth" between the Navy and Worthington regarding the design or nature of Worthington's pumps, turbines and/or compressors. Thus, Worthington would have failed to satisfy the burden imposed upon it, in the New York court and in every circuit, to establish government contractor immunity *even with respect to a design defect claim* (which, in any event, was withdrawn in this case).

There is also a serious question about whether there is even a predicate for alleging government contractor immunity in this case, since Worthington's own corporate designee admitted that there was no military specification for the very replacement parts to which Mr. Ronsini was exposed [Pet.'s App. at 60a; TT 1943].

The Court of Appeals in *Tate* next addressed the District Court's automatic dismissal of plaintiffs' failure-to-warn claim. The Sixth Circuit panel reversed the lower court's holding because it determined that a separate analysis, and a separate factual predicate, are required before government contractor immunity can be deemed to apply to the failure-to-warn claim. 55 F.3d at 1156-57. The Court noted that, "[s]imply because the government exercises discretion in approving a design does not mean that the government considered the appropriate warnings, if any, that should accompany the product." *Id.* at 1156.[11] Accordingly, the *Tate* Court remanded the case for a separate determination on the failure-to-warn issue. *Id.* at 1157.

In sum, the state of the law in the Sixth and Seventh Circuits is consistent with that in the Fourth and Fifth Circuits. In none of these courts would Worthington be afforded government contractor immunity with respect to plaintiff's failure-to-warn claim. Nor does the doctrine as enunciated by these courts in any way conflict with the Appellate Division's ruling in the present case, or with any other appellate rulings.[12]

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11. The *Tate* Court also wisely warned against conflating the third *Boyle* element with state failure-to-warn requirements, as Worthington attempts in its petition. While the *Boyle* element "simply encourages contractors to provide the government with all the information required to soundly exercise its discretion," state failure-to-warn requirements " 'accomplish an entirely different objective of helping those who use or otherwise come into contact with a product to protect their own safety.' " 55 F.3d 1150, 1156 (quoting *New York Asbestos Litig.*, 897 F.2d 626, 632 (2d Cir. 1990)).

12. As a point of information, it should be noted that Worthington's claim of conflict rests principally on dicta in the repetitive stress injury case of *Russek v. Unisys Corp.*, 921 F. Supp. (Cont'd)

(Cont'd)
1277 (D.N.J. 1996). It should also be noted that Worthington does not claim that it could have prevailed, nor would it prevail, under the ruling in *Russek*. The District Court there accurately stressed that, under *Boyle*, there must be "a 'continuous back and forth' [between the Government and the contractor] as to the product feature containing the alleged design defect . . . ," 921 F. Supp. 1277, 1294, an element present in *Russek* yet wholly absent in the present case. *Accord Tate*, 55 F.3d 1150, 1154; *Harduvel*, 878 F.2d 1311, 1320; *Koutsoubos*, 755 F.2d 352, 355. In all events, the *Russek* decision is based solely on the facts and circumstances unique to it, and on product liability principles peculiar to New Jersey, which views a failure-to-warn claim as a species of design defect claim. *Russek*, 921 F. Supp. 1277, 1294; *see also Yeroshefsky v. Unisys Corp.*, 962 F. Supp. 710 (D. Md. 1997) (repetitive stress injury decision adopting Sixth Circuit pronouncement in *Tate)*.

Further, *Russek* is not the only district court case, and certainly not the definitive word, within the Third Circuit addressing the government contractor issue with respect to a failure-to-warn claim. *See Megill v. Worthington Pump, Inc.*, 1999 U.S. Dist. LEXIS 4433, LEXIS op. at 12 (D. Del. Mar. 26, 1999) (under factual circumstances virtually identical to those in the present case, court rejected Worthington's government contractor defense in the context of removal, and ordered the case remanded to the State court because Worthington had failed to establish that the Navy had participated in, or caused, Worthington's failure to warn); *see also Feidt v. Owens Corning Fiberglas Corp.*, 153 F.3d 124, 127 (3d Cir. 1998) (asbestos case in which removal deemed inappropriate because defendant contractor "failed to establish the necessary causal connection between [its] failure to warn [and defendant's] military contract obligations").

CONCLUSION

A review of the decisions nationwide demonstrates that there is no conflict, let alone a meaningful one, between the circuits in applying the government contractor defense to failure-to-warn claims. Nor does the doctrine enunciated by the various appellate courts conflict with the Appellate Division's ruling in the present case, or with this Court's pronouncement in *Boyle*. Accordingly, for all of the reasons set forth above, the respondent respectfully requests that the Court reject petitioner's request for a writ of certiorari.

Respectfully submitted,

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